

# EPOs and DVOs: Significant Protection; Significant Restrictions; Potential for Abuse

By Amanda Lester Hill

The statutory processes for acquiring an emergency protective order (EPO) and subsequent domestic violence order (DVO) were designed to be fast, easy and user-friendly. The intent is for a victim of domestic violence to be able to act quickly, in a *pro se* capacity, in order to obtain a restraining order that will afford that victim immediate protection from the abuser.

The purpose of KRS 403.715, *et seq.*, titled "Domestic Violence and Abuse," is indeed noble. The statutes were enacted "to allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible."<sup>1</sup> The statute enables law enforcement officers to better respond to domestic violence and assist victims.<sup>2</sup> If there is probable cause that the order of protection has been violated, peace officers have the authority to apprehend and charge the violator.<sup>3</sup> Courts may thereafter conduct contempt proceedings which may result in jail time for the offender.<sup>4</sup> In certain situations, EPOs and DVOs serve as lifesavers.

While most legal proceedings give little regard for accessibility and ease of use, the EPO and DVO process is an exception. The abused victim can get the necessary paperwork, in the form of a convenient and self-explanatory form, and file it without help, direction or assistance of counsel. Abused victims find the doors of the courthouse wide open and accessible. There is no fee for filing an EPO or DVO, no fee for service of process and no bond required of the petitioner.<sup>5</sup> Theoretically, the end result is that it is easy for an abused victim to get an EPO and subsequent DVO against his or her abuser that will afford immediate protection and safety.

## EPO

To initiate the process, the petitioner completes the petition for an EPO, which is reviewed by a judge or a trial commissioner. If the allegations set forth in the petition establish the presence of an immediate and present danger of domestic violence and abuse, an *ex parte* EPO "shall" be entered.<sup>6</sup> Upon the issuance of an EPO, a date for a full hearing shall be fixed prior to the expiration of the EPO.<sup>7</sup> If service has not been effectuated on the respondent, the EPO may be reissued for another fourteen (14) days with a new hearing date fixed during that period.<sup>8</sup>

If the court determines that the allegations contained in the petition do not indicate the presence of an immediate and present danger of domestic violence, the court is still required to set a hearing and cause a summons to be issued for the adverse party.<sup>9</sup>

With perhaps the notable exception of actual perpetrators of domestic violence, everyone agrees that victims of domestic violence need and indeed deserve protection. Thanks to KRS 403.715, *et seq.*, the court system is able to offer at least some protection to the vulnerable members of society who need it most. But with good intentions comes the potential for abuse of the system.

## DEFINITION OF DOMESTIC VIOLENCE AND ABUSE

Pursuant to KRS 403.720, domestic violence and abuse are defined as "physical injury, serious physical injury, sexual abuse, assault or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault." The statute is somewhat vague in defining in any concrete detail what actually constitutes a threat of violence or an overt act of violence, leaving the judge a great deal of discretion when deciding whether a DVO is actually warranted. Requirements regarding the

proximity of time between the incident or incidents of domestic violence and the filing for the protective order are also conspicuously absent from the statute again allowing the judge a great deal of discretion when deciding whether or not to issue a DVO.

## DVO HEARING

At the DVO hearing, the petitioner must establish that an act or acts of domestic violence have occurred and may again occur.<sup>10</sup> A full evidentiary hearing is required.<sup>11</sup> A trial court's failure to hold a full evidentiary hearing constitutes a violation of due process.<sup>12</sup> If the petitioner establishes that an act or acts of domestic violence have occurred and may again occur, the court may enter a DVO which can be put into effect for up to three years.<sup>13</sup>

The use of the word "may" in the statute indicates that the legislature intended for judges to be given latitude when deciding whether or not to issue a DVO.<sup>14</sup> In order to enter a DVO, the court must find by a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur.<sup>15</sup> The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim was more likely than not to have been a victim of domestic violence.<sup>16</sup> Given the fact that the stakes can be high in failing to enter a DVO when one is truly needed, there understandably may be a collective mentality on the part of judges to err on the side of caution when deciding whether or not to enter a DVO. With all things being equal and the judge not knowing which party to believe, it is logical to surmise that judges may often have a tendency to go ahead and enter a DVO.

Given the nature of these types of proceedings, hearings often consist solely of testimony from the parties with the petitioner alleging abuse and the respondent denying it. The judge

presiding over the case is then left to his or her own devices in attempting to determine which party is telling the truth. The difficulty of the judge's job is exacerbated by the fact that the *pro se* litigants are generally unfamiliar with the court's rules of procedure and rules of evidence.

Prior to the expiration of a DVO, a motion to extend the DVO may be filed.<sup>17</sup> A hearing is not required in order for a DVO to be reissued.<sup>18</sup> However, a party may present testimony that acts of domestic violence have not occurred during the pendency of the order.<sup>19</sup> There is no limit on the number of times an order may be reissued.<sup>20</sup>

### POTENTIAL RAMIFICATIONS OF ENCOURAGING PRO SE LITIGATION

Despite the gravity of these proceedings, the petitioners and the respondents alike are very often unrepresented by counsel. Often the parties cannot afford to hire counsel. The respondent may not have adequate notice of the DVO hearing to retain counsel or the respondent may be unaware of the seriousness of the situation and accordingly may not realize the importance of acquiring legal representation.

The importance of legal counsel becomes even greater if the parties have children together or live together. Issues pertaining to custody and child support can be decided with the issuance of an EPO and/or DVO.<sup>21</sup> The court can also make the decision to allow the peti-

tioner to remain in the parties' home and force the respondent to leave.<sup>22</sup> While the issuance of a three-year no-contact order in and of itself may not be too significant to the respondent or disruptive to his life, a three-year no-contact order making it illegal for the respondent to be around his children, or an order depriving the respondent of his home for three years, will undoubtedly have major adverse consequences for the respondent.

The repercussions of a DVO can be huge for both parties. For the respondent, the issuance of a protective order may involve the stripping away of constitutional rights such as parental rights<sup>23</sup> and the right to bear arms.<sup>24</sup> KRS 403.750(1)(h), a catch-all provision of sorts, provides the trial court with exceedingly broad authority to enter "other orders" believed to be "of assistance in eliminating future acts of domestic violence and abuse."

### CUSTODY, CHILD SUPPORT AND LIVING ARRANGEMENTS DECIDED IN EPO/DVO PROCEEDINGS

While the domestic violence civil protection orders allowed by most states afford some provision for child custody and child support, many others do not. Laws pertaining to domestic violence civil protection orders enacted in Arizona, Michigan, Oklahoma and Wisconsin do not allow for any provisions to be made concerning custody and/or child support.<sup>25</sup> Other states, such as Colorado, Massachusetts, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah and Washington, allow only for temporary child custody and/or child support orders.<sup>26</sup> Similarly, most, but not all, states allow for so-called "kick out" orders to be put into effect, as well.<sup>27</sup>

With regards to decisions involving custody, it is irrefutable that if incidences of domestic violence are occurring in the child's immediate family, that child does not need to be exposed to the abuse under any set of circumstances regardless of whether or not the abuse is directed toward the child or occurs in the child's presence.

However, due to the broad definition set forth in KRS 403.720, the petitioner does not actually have to be "abused" in the traditional sense in order to have adequate grounds for getting an EPO and DVO. The subjective fear of abuse in and of itself may be enough to convince the court to enter an EPO and subsequent DVO. Further, there is no requirement that the fear of abuse itself be rational or reasonable.

When a DVO is entered and the parties have children together, it stands to reason that custody will then be awarded to the petitioner. It arguably would be a flagrant abuse of discretion if custody of the children were awarded to the abuser. Given the intentionally *pro se* friendly nature of the EPO and DVO process, it has not taken long for some parents either undergoing or about to undergo a period of separation or divorce to discover that the EPO and DVO process can provide a quick, easy and inexpensive means of gaining custody of the parties' children along with child support and exclusive possession of the couples' residence.

Once the court conducts a hearing and enters a DVO, the petitioner automatically has an advantage in any impending or pending custody actions. Unfortunately, the truth does not always prevail in these situations in large part because of the relatively low burden of proof combined with the trial court's presumable propensity to err on the side of caution in issuing DVOs.

The impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator.<sup>28</sup> Entry of a DVO comes with severe consequences. It can mean the immediate loss of custody of one's children and the loss of one's home. Depending on the respondent's job, it can also mean loss of employment and financial resources. Further, the wrongful entry of an EPO or DVO can result in the loss of one's dignity as being stigmatized as a perpetrator of domestic violence. One becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a DVO regardless of the situation or circumstances surrounding



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the violation.<sup>29</sup> The Court of Appeals has recognized that in some instances, individuals will manipulate the EPO and DVO system in order to “win” the first battle of a divorce, custody, or criminal proceeding, or in order to get a “one-up” on the other party.<sup>30</sup> The Court of Appeals found this type of behavior as offensive as domestic violence itself.<sup>31</sup>

While the full impact of EPOs and DVOs are not always immediately seen, the protection and hope they provide can have lasting effects on the victim.<sup>32</sup> These court proceedings can have enormous significance to the parties involved.<sup>33</sup> The repercussions of entering a DVO when one is truly needed, or failing to enter a DVO when one is truly needed, can have long-lasting and disastrous consequences. Yet these proceedings have enormous potential for abuse. The sheer accessibility of EPOs and DVOs make their acquisition sought after by victims of abuse as well as by vindictive spouses embroiled, or about to become embroiled, in a bitter dispute over custody and possession of the marital residence.

Should the trial court choose to enter a DVO, the petitioner is clearly in a better position to prevail at future hearings involving custody. The petitioner is also in a position of power to some degree inasmuch as he or she is able to hold the threat of criminal sanctions over the respondent. While the Commonwealth must have some measures in place to afford victims of domestic violence protection, it must also be kept in mind that the consequences of improperly entering a DVO can be devastating in terms of depriving the respondent of his or her children, home and potentially even his or her freedom. Ⓢ

#### ENDNOTES

1. KRS 403.715(1).
2. KRS 403.715(2).
3. KRS 403.715(3).
4. *Id.* See also, KRS 403.763.
5. KRS 403.740(3); KRS 403.740(5).
6. KRS 403.740(1).
7. *Id.*
8. *Id.*
9. KRS 403.745.
10. KRS 403.750(1).



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11. *Wright v. Wright*, 181 S.W.3d 49 (Ky. App. 2005); *Rankin v. Criswell*, 277 S.W.3d 621 (Ky. App. 2008); *Manning v. Willett*, 221 S.W.3d 394, 400 (Ky. App. 2007). Due to the “awesome impact” each case has, a full evidentiary hearing must be afforded to the parties as provided for by the statutes and court rules.
12. *Id.*
13. KRS 403.740(4); KRS 403.750(1).
14. KRS 403.750(1). The legislature chose the use of the word “may” in the DVO statute as opposed to the use of the word “shall” in the EPO statute.
15. KRS 403.750(1).
16. *Baird v. Baird*, 234 S.W.3d 385 (Ky. App. 2007).
17. *Fedders v. Vogt-Kilmer*, 292 S.W.3d 905 (Ky. App. 2009).
18. *Kessler v. Switzer*, 289 S.W.3d 228 (Ky. App. 2009); KRS 403.750(2).
19. KRS 403.750(2).
20. *Id.*
21. KRS 403.740(1)(e); KRS 403.750(1)(e).
22. KRS 403.740(1)(d); KRS 403.750(1)(e).
23. Parents have both a statutory and a constitutional right to the care and custody of their children. *Moore v. Asente*, 110 S.W.3d 336, 358 (Ky. 2003).
24. Second Amendment (Amendment II) to the United States Constitution. 18 U.S.C. § 922(g)(8) makes it illegal for a person subject to a domestic violence order to possess a firearm.
25. Ariz. Rev. Stat. §13-3602; Mich. Comp. Laws § 600.2950; Okla. Stat. Tit. 22 § 60.2; Wis. Stat. §813.125.
26. Colo. Rev. Stat. Ann. § 13-14-102; Mass. Gen. Laws Ch. 209A, § 1; Minn. Stat. Ann. §518B.01; Neb. Rev. Stat. §42-903; N.M. Stat. Ann. §40-13-3; N.C. Gen. Stat. §50B -1; N.D. Cent. Code §14-07.1-02; Ohio Rev. Code Ann. § 3113.31; Or. Rev. Stat. Ann. § 107.705; 23 Pa. Stat. Ann. §6102; S.C. Code Ann. §20-4-40; S.D. Codified Laws § 25 -10-3; Tenn. Code Ann. §36-3-605; Utah Code Ann. §30-6-4; Wash. Rev. Code §26.50.010 (2006).
27. Ark. Code Ann. § 9-15-201 (Arkansas statute is unclear whether kick out orders are allowed or not); Conn. Gen. Stat. §46B-15 (Connecticut statute is unclear whether kick out orders are allowed or not); Haw. Rev. Stat. §586-3 (Hawaii statute is unclear whether kick out orders are allowed or not); Mich. Comp. Laws Ann. § 600.2950 (Michigan statute only allows kick out orders in certain circumstances); N.Y. Fam. Ct. Act §842 (New York statute does not allow kick out orders); Or. Rev. Stat. Ann. § 107.705 (Oregon statute only allows kick out orders in certain circumstances); Wis. Stat. §813.12(5) (Wisconsin statute does not allow kick out orders).
28. *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App., 2005).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*



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